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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CAPITAL IMAGING ASSOCIATES, P.C.,

Petitioner,

vs.

MOHAWK VALLEY MEDICAL ASSOCIATES, INC., MOHAWK VALLEY PHYSICIANS HEALTH PLAN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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Petitioner Capital Imaging Associates, P.C. ["Capital"] submits this Reply in response to the Brief of respondents, Mohawk Valley Medical Associates, Inc. ["MVMA"] and Mohawk Valley Physicians Health Plan, Inc. ["MVP"].

PRELIMINARY STATEMENT

MVMA includes 64% of all physicians in Schenectady County (including 75-80% of primary care physicians in that county) [A594], 82% of all physicians in Saratoga County, 69% in Montgomery County, 46% in Fulton County, and 35% in Rensselaer County. [A460][1] These figures are specifically referred to in the opinion of the District Court. *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 791 F. Supp. 956, 966 (N.D.N.Y. 1992) [App. to Pet., pp. A-56-57]. Respondents' allegation in their brief [pp. 19-20] that Capital first presented these statistics on petition to this Court is a complete falsehood.

Capital's presentation of its anti-

[1] These references are to the Appendix filed in the proceedings before the United States Court of Appeals for the Second Circuit.

trust claim has been entirely consistent at all stages of this litigation. Capital argued to the District Court as follows:

> Capital has demonstrated that defendants [MVMA and MVP] purposefully excluded Capital in order to protect MVMA's radiologist members from competition. An arrangement which excludes competitors cannot be sustained under the Rule of Reason unless a pro-competitive justification for the practice is supplied. . . . [T]he present case involves the horizontal exclusion of Capital by an organization of its competitors, with the result that referring physicians and their patients are deprived of choice among competing radiologists based on differences in quality, service and location.

[SA 80, 85, 86][2]

ARGUMENT

I. A NEW DECISION UNDERSCORES THE NEED FOR THIS COURT TO GRANT CERTIORARI.

The split in the Circuit Courts iden-

[2] These references are to the Supplemental Appendix filed by respondents in the proceedings before the United States Court of Appeals for the Second Circuit.

tified in the petition is further elucidated by *United States v. Brown Univ.*, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3rd Cir. 1993), a recent decision referred to obliquely by respondents. *Brown* was decided on September 17, 1993, while the petition herein was going to press. Hence, *Brown* will be discussed at length in this reply brief *infra*.

A. Three Reasons to Grant Certiorari

Respondents' brief is filled with rhetoric, adjectives, and hyperbole, but, in substance, only enhances Capital's position that it is imperative for this Court to grant certiorari. They point out three reasons why the very meaning of the antitrust Rule of Reason is at stake.

First, the ramifications of this case extend far beyond the field of health care. In particular, this case forms part

of a larger controversy among the Circuits concerning the meaning of a fundamental antitrust decision, *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986). The Third Circuit in *Brown* takes petitioner's side in this controversy.

Second, this Court should grant certiorari to preserve the important distinction between horizontal and vertical restraints. The Court of Appeals squarely held that the conspiracy between MVP and MVMA was horizontal. *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 545 (2nd Cir. 1993). "Our view does not interfere with either an HMO's ability to enter into vertical agreements with doctors associations or with physicians' abilities to regulate membership in practice associations for medically supportable reasons."

Id. Capital objects to a particular abuse of the process of applying for admission to an association of approximately 70% of the physicians in a five county area. The association denied Capital membership without medical justification, with the intent of insulating its members from competition in the five county area, and had sufficiently "captured" an insurer, MVP, to induce it to join the conspiracy.

Nevertheless, respondents realize that the linchpin of the Second Circuit's decision, *i.e.* its demand for empirical proof of market power or anticompetitive effect, does not make sense in the context of a horizontal restraint. Such a requirement was specifically rejected by the Third Circuit in *Brown*. Consequently, respondents misrepresent Capital's case as challenging a health insurer's right to

enter into an exclusive contract with a preferred physicians' organization. They deny restraining competition in the health insurance market and provide this Court with string citations of over 20 cases involving exclusive contracts and tying arrangements, classic vertical restraints. However, these arguments attempt to erect a straw man. They have nothing to do with Capital's challenge to its horizontal exclusion from membership in an association of competing physicians.[3]

Third, respondents argue that the procompetitive virtues of HMOs should

[3] Respondents cite two cases in which physicians were disciplined or not hired for medical reasons. *Flegel v. Christian Hospital Northeast-Northwest*, 1993-2 Trade Cas. (CCH) ¶ 70,355 (8th Cir. 1993); *Hassan v. Independent Practice Assocs.*, 698 F. Supp. 679 (E.D. Mich. 1988). *See also, Austin v. McNamara*, 797 F.2d 728 (9th Cir. 1992) (immunity for peer review process under Health Care Quality Improvement Act). In contrast, no medical justification was ever offered for the exclusion of Capital, nor was Capital the subject of anything remotely resembling a valid medical peer review process.

absolve them of responsibility for their concerted effort to restrain competition among physicians. However, as in *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984), the undoubted legitimacy of the joint venture does not shield a particular restraint from antitrust scrutiny. 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 432 (1986). When a joint venture imposes a naked restraint on competition, the Third Circuit held in *Brown* that the factfinder must decide at trial whether there are any procompetitive justifications which can overcome the nakedness of the restraint. This is precisely the result sought by petitioners herein.

B. The *Brown* decision illustrates each of these three reasons.

In *United States v. Brown University*, 1993-2 Trade Cas. (CCH) ¶ 70,358 (3rd Cir.

1993), the Department of Justice sought to invalidate a horizontal agreement in which eight Ivy League Colleges and the Massachusetts Institute of Technology (MIT) distributed financial aid solely on the basis of need and determined collectively the exact amount of financial assistance given to each student admitted to member schools. The agreement allegedly deprived students of the benefits anticipated if schools freely competed to attract needy or academically exceptional students. After a ten-day bench trial, the District Court found for the plaintiff.

The Court of Appeals' recited the general Rule of Reason principles quoted in respondents' brief. [pp. 9-10, citing, *inter alia*, *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984)]. However, the Third Circuit did not apply this analysis

to the horizontal restraint.

> In addition to the traditional rule of reason and the *per se* rule, courts sometimes apply what amounts to an abbreviated or 'quick look' rule of reason analysis. It applies in cases where *per se* condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint. See *NCAA*, 468 U.S. at 109 (quoting [*National Soc'y of*] *Professional Engineers*, 435 U.S. [679 at] 692 [1978]; *Indiana Dentists*, 476 U.S. at 459). [Parallel citations omitted]. Because competitive harm is presumed, the defendant must promulgate 'some competitive justification' for the restraint, 'even in the absence of detailed market analysis' indicating actual profit maximization or increased costs to the consumer resulting from the restraint. [*Id.*].

Id. at 70,889.[4]

[4] The Court in *Brown* did not view *NCAA*, *Dentists*, or *Engineers* as decisions based on an implicit finding of market power. The Third Circuit thus disagrees with the Jorde and Teece article cited by respondents in their brief [p. 21] which advocates a change in existing law. *Brown* also rejected respondents' contention that an antitrust defendant must justify its conduct only when the *per se* rule is invoked. *Accord*,

The Court regarded this method of analysis as an integral part of the Rule of Reason (and not some bastardization of the *per se* rule, as respondents suggest). Shifting the burden to the defendant to justify its conduct was entirely appropriate because the practice "'impeded the ordinary give and take of the market place,'" and hence was "anticompetitive 'on its face.'" *Id.* at 70,892-93. [citing *Engineers*, 435 U.S. at 692-93 (1978)].

Indeed, shifting the burden to respondents to justify their conduct is even more appropriate in the present case than in *Brown*. In *Brown*, the intent of the colleges in adopting the plan was uncer-

Hahn v. Oregon Physicians Serv., 868 F.2d 1022 (9th Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) (only price fixing claim given *per se* treatment; nevertheless, physicians' association required to justify horizontal exclusion under Rule of Reason without detailed market analysis, citing *Dentists*).

tain. On the other hand, the Second Circuit specifically identified the evidence that these respondents intended to restrain competition.

> The defendants' intention may serve a special role in helping to characterize the conduct of generally lawful associations. . . . Although not determinative, intention may illuminate an otherwise uncertain effect, benefit or virtue. . . . If [respondents] fail to suggest any [benefits from their conduct], the court is entitled to assume there are none. Redeeming virtue is also negated by a stated exclusive purpose to eliminate competition inter se.

Areeda, *supra*, ¶ 1506, p. 392, 1993 Supp., p. 1115. *Accord*, *Brown*, 1993-2 Trade Cas. at 70,891 ("courts often look at a party's intent to help judge the likely effects of challenged conduct"). The doctors' own intent provides a far better guide to respondents' influence in the market than their misleading statistics. "They

therefore believe that they have the market power to make it selfishly worthwhile to restrain competition among themselves." Areeda, *id*.

A restraint is "naked" when the defendant is entirely unable to identify "those benefits to society which will be lost if we prohibit the challenged conduct." Areeda, *supra* at ¶ 1504, pp. 378-79. As the Second Circuit correctly pointed out, the HMO will function just as effectively, if not more so, if respondents are prohibited from excluding Capital for illegitimate, non-medical reasons.

In *Brown*, the Third Circuit unequivocally rejected the identical arguments advanced by respondents herein.

> **MIT's principal counterargument is that an abbreviated rule of reason analysis is appropriate only . . . when evidence establishes that 'the challenged practice, unlike Overlap, mani-**

> **festly has an adverse effect on price, output, or quality.'** . . . As the Division aptly points out, however, if an abbreviated rule of reason analysis always required a clear evidentiary showing of detrimental effect on price, output, or quality, it would no longer be abbreviated. . . . **This is because proof of actual adverse effects generally will require elaborate, threshold industry analysis that an abbreviated inquiry is designed to obviate.** . . . MIT's position is also contradicted by Supreme Court precedent.

1993-2 Trade Cas. at 70,893. [Citations omitted.] [Emphasis added.] The Third Circuit agreed with petitioners that a showing of harm to the competitive process is sufficient to shift the burden to defendants to justify their conduct. "[A]ctual dollar amounts do not reflect the harm to competition which Congress intended to eliminate in enacting the Sherman Act." *Id.*

The Court in *Brown* saw no need to

define the proper geographic market (if one were possible to define). Elaborate market analysis was not required in the case of a naked restraint. Nor did the Third Circuit regard as significant students' ability to enroll at a wide variety of alternative colleges of equal prestige, such as Stanford, not to mention smaller Eastern schools, such as Amherst and Williams. The availability of alternatives does not obviate the need to justify anti-competitive conduct. "If the type of restraint appeared significant and the redeeming virtues did not appear powerful, it would take little proof to persuade the tribunal that the restraint is unreasonable, notwithstanding competition from other financial institutions." P. Areeda, *The Rule of Reason - A Catechism on Competition*, 55 Antitrust L.J. 571, 579 (1986).

MVP has no right to artificially force consumers to go outside the health plan to obtain access to additional radiologists. "The [Supreme Court explained that 'the Rule of Reason does not support a defense based on the assumption that competition itself was unreasonable.'" *Brown*, 1993-2 Trade Cas. at 70,895 [quoting *Engineers*, 435 U.S. at 696]. Moreover, the claim that the health plan had a sufficient number of radiologists was not asserted when the decision to exclude Capital was made. Rather, it was a *post hoc* rationalization propounded by respondents' attorneys. [A169-71,346-78]

Ultimately, the Court of Appeals in *Brown* reversed and ordered a new trial because the District Court failed to give adequate treatment to the procompetitive justifications proffered by MIT. MIT

argued that the challenged restraint actually enhanced consumer choice. *Id.* at 70,894. Although Capital readily concedes that HMOs are procompetitive generally, respondents have not even hinted at a way in which the particular restraint at issue can enhance consumer choice.

The primacy of consumer choice in *Brown* demonstrates that any direct attack on competition, whether or not it impacts upon price, is properly classified as a naked restraint. "[R]estraining competition for its own sake" and "price fixing" are both classic examples of naked restraints. Areeda, *The Rule of Reason*, *supra*, at 577. This is the proper interpretation of *Dentists*.

> [T]he [Supreme] Court emphasized that the dentists limited consumer choice, impeding the ordinary give-and-take of the market place: the dentists were not entitled to pre-empt the market

> and decide collectively that their customers do not need that which they demand.

Id. at 576.[5]

Thus, injury to the competitive process is critical to antitrust analysis. Particularly at the summary judgment stage, the Rule of Reason does not mandate inquiring whether the competitive process has been sufficiently impaired to ultimately generate empirical or quantitative evidence of harm to price or quality. "[O]utput is not always a clear concept. Even when we define it, it is usually difficult to observe. Many alleged restraints are examined before they have had time to work their results." 7 Areeda, *supra*, at ¶ 1503, p. 376.

[5] Non-price restraints have also been classified as "naked." *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S.Ct. 461 (1992).

Rule of Reason analysis begins with an effort to predict the consequences of a challenged restraint.

> This standard formulation [*Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918)] points us in two clear directions, and a third as well. *First*, what harm to competition results or may result from the collaborators' activities? *Second*, what is the object they are trying to achieve, and is it a legitimate and significant one; that is, what are the nature and magnitude of the 'redeeming virtues' of the challenged collaboration? *Third*, is the restraint reasonably necessary for the achievement of any such legitimate objectives?

Id. at ¶ 1502, p. 371.

When a practice, such as MVMA's exclusion of Capital, is intended as a direct attack on competition, intrinsically reduces consumer choice, and has no redeeming virtue, it is inappropriate to award the defendant summary judgment on the ground that the restraint has not yet

achieved its intended effects. Rather, the matter should proceed to trial. At trial, "[t]he absence of any finding of adverse effects such as higher price or lower output is relevant, albeit not dispositive, when the district court considers whether [the defendant] has met this burden [to justify its conduct]." *Brown*, 1993-2 Trade Cas. at 70,893.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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